

**United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL**

Advice Memorandum

DATE: December 29, 2003

TO : Rochelle Kentov, Regional Director
Region 12

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Barry University 111-5000
Case 12-CA-22936-1 177-2884-0150
280-8220

This Section 8(a)(1) and (4) case was submitted for advice as to whether the Board has jurisdiction over the faculty of a University that is sponsored by a religious order of Catholic nuns.

We conclude that, because the University's board of trustees and administration adhere to and seek to fulfill a stated religious mission, asserting jurisdiction here would create a significant risk of infringing on the rights guaranteed by the Religion Clauses of the First Amendment. Moreover, asserting jurisdiction in this case would require the Board to engage in the type of inquiry the Supreme Court disapproved in NLRB v. Catholic Bishop of Chicago.¹

FACTS

Barry University is a nonprofit educational institution with its main campus in Miami Shores, Florida. A Catholic religious order, the Sisters of St. Dominic of Adrian, Michigan (the Order), sponsors the University. According to the Order's website, "[s]ponsorship is an ongoing relationship whereby [the Order] influence[s] an institution in a way that furthers the mission of both institution and Congregation. The mission statements of each of the sponsored institutions flows from that of the [Order] and provides clarity and purpose for their existence."

In 1940, the Mayor of Miami Shores deeded to the University the original 40 acres that made up the Miami Shores campus. That campus now covers 123 acres and the Order provided a significant amount of that additional property. The Order also financed the construction of a number of the buildings on the campus. Private donations funded the construction of several other campus buildings and a grant from the Federal Aviation Administration funded the construction of one specific building.

¹ 440 U.S. 490, 502 (1979).

The University's primary source of revenue comes from student fees and tuition. Over 70% of the student body receives federal financial assistance for tuition and related expenses. The University also receives funds through donations. The Order was one of 19 individuals or entities that contributed at least \$1 million to the University in 2002. Several departments and agencies within the Federal Government also have provided the University with funding through grants.

Article I, Sections 1 and 3 of the University's Articles of Incorporation state,

[t]he general purpose of this Corporation, which was founded as a Catholic institution of higher education, is to offer quality education, to assure a religious dimension, and to provide community service and presence within a more caring environment.

* * *

The mission of the Corporation shall be to remain an institution whose mission is congruent to the mission of its founders, the Adrian Dominican Congregation and the goals and values of higher education.

The University is governed and controlled by an independent, self-perpetuating board of trustees, whose composition can vary from nine to 50 members. The Articles of Incorporation require that at least five trustees on the board must be Adrian Dominican Sisters. Of the 48 current trustees, those affiliated with the Catholic Church include eight sisters, one priest, and the Archbishop of Miami.

The board of trustees controls the affairs, business, and property of the University. The board also established a Mission Effectiveness Committee to ensure that the University's religious mission is pursued and implemented. The University asserts that the board of trustees has never voted contrary to its Catholic heritage and that such a vote would cause it to lose its sponsorship by the Order and its designation as a Catholic institution.²

The board of trustees also appoints the University's president. Each of the University's presidents, including the current president, has been an Adrian Dominican Sister, although this is not required by the bylaws. Along with the

² The University is currently listed in the Official Catholic Directory.

president, the executive vice-president and the vice-president for planning and assessment³ comprise the University's Executive Division which, among other things, ensures the presence of "a vital Christian community" at the campus.

The University provides identical mission statements in the faculty and student handbooks as well as on its website. The University states that its ". . . primary purpose . . . is to offer its students quality education. Furthermore, [the University] commits itself to assuring a religious dimension and to providing community service and presence within a more caring environment." Moreover, the University states that it seeks "to instill in its students St. Dominic's vision of a world that celebrates God's dwelling within us and among us. . . ." The University also seeks to "foster[] academic distinction in the liberal arts and professional studies within the Judeo-Christian heritage and the tradition of St. Dominic." Finally, the University states that it seeks to attract a diverse student body from various geographic, ethnic, religious, and socio-economic backgrounds, as well as a diverse faculty and staff.

There is no requirement that either students or faculty members be Catholic. Only about 50% of the current student body is Catholic. The 2002-2003 Undergraduate Catalog states that "[s]tudents are expected to comply with the legal and ethical standards of [the University], both as an institution of higher learning and as a Catholic University. . . ." Students in various departments have certain theology and/or philosophy course requirements. For example, undergraduate students in the School of Arts and Sciences must take two courses in theology out of a total of 17 or 18 required courses. The Spring 2003 course book shows that several of the theology courses are taught by either a Catholic priest or a sister.⁴ Students are not required to attend the daily religious services available at the Cor Jesu Chapel located on the Miami Shores campus.

About 53% of the University's faculty and staff is Catholic. Faculty members are not required to teach Catholic doctrine or inject a religious component to their courses. The 2002-2003 Faculty Handbook states that such academic freedom is not to be construed as permission to promote doctrines and views that are contrary to the nature,

³ Both of these additional administrative officers are currently Adrian Dominican Sisters.

⁴ It is unclear if all of the offered theology courses deal with Catholicism.

purpose, and objectives of the University. During the hiring process, potential professors are asked if they will support the University's stated mission. The University asserts that one consideration for faculty promotion is how a professor contributes to the University's mission, including the University's commitment to its "religious dimension."

Nancy Maldonado is an assistant professor in the University's Adrian Dominican School of Education. In spring 2003, she filed an unfair labor practice charge alleging that the University violated Section 8(a)(1) and (4) of the Act when it retaliated against her for engaging in protected, concerted activities. Maldonado had repeatedly complained to the University's administration about issues such as faculty turnover and workload. The charge alleged, among other things, that the University unlawfully offered Maldonado a one-year contract renewal rather than a three-year contract renewal, issued her a letter of reprimand, and threatened to terminate her employment. The University asserts that it took these adverse personnel actions because Maldonado had displayed a lack of collegiality and had created a divisive environment.

The Region has found merit to the allegations of the charge and is prepared to issue a complaint alleging that the University violated the Act.

ACTION

We conclude that the Region should dismiss the charge, absent withdrawal. The Board should not assert jurisdiction over this case because the University adheres to and seeks to fulfill a stated religious mission. Moreover, asserting jurisdiction in this case would require the Board to engage in the type of inquiry the Supreme Court stated in Catholic Bishop would violate rights guaranteed by the Religion Clauses of the First Amendment.

The Board does not have jurisdiction over lay teachers in church-operated schools.⁵ In Catholic Bishop, the Supreme Court found that such schools involved "substantial religious activity and purpose" and that the "substantial religious character of these church-related schools gives rise to entangling church-state relationships of the kind the Religion Clauses sought to avoid."⁶ Based on those

⁵ See NLRB v. Catholic Bishop of Chicago, 440 U.S. at 506.

⁶ Id. at 503 (quoting Lemon v. Kurtzman, 403 U.S. 602, 616 (1971)).

concerns, the Court concluded that Constitutional difficulties would result from Board jurisdiction over the relationship between church-operated schools and their teaching employees, i.e., substantial risk of infringement to First Amendment rights.⁷ For example, if a school administrator defended against an unfair labor practice charge by relying on the school's religious mission, the Board would be required to assess whether the administrator relied in good faith on religious doctrine.⁸ Failing to find a "clear expression of Congress' intent to bring teachers in church-operated schools within the jurisdiction of the Board," the Court "decline[d] to construe the Act in a manner that could in turn call upon the Court to resolve difficult and sensitive questions arising out of the guarantees of the First Amendment Religion Clauses."⁹

The Board decides on a case-by-case basis whether a religion-affiliated school has a "substantial religious character" so that asserting jurisdiction would raise a significant risk of violating First Amendment rights.¹⁰ In making this determination, the Board analyzes "the purpose of the employer's operations, the role of the unit employees in effectuating that purpose, and the potential effects if the Board exercised jurisdiction."¹¹ Thus, the Board considers such factors as the "involvement of the religious institution in the daily operation of the school, the degree to which the school has a religious mission and curriculum, and whether religious criteria are used for the appointment and evaluation of faculty."¹²

⁷ Id. at 501-503.

⁸ Id. at 502.

⁹ Id. at 507.

¹⁰ University of Great Falls, 331 NLRB 1663, 1664 (2000), enf. denied, 278 F.3d 1335 (D.C. Cir. 2002). See also Jewish Day School of Greater Washington, 283 NLRB 757, 761 (1987) (refusing to assert jurisdiction where employer's "purpose and function in substantial part [was] the propagation of a religious faith").

¹¹ University of Great Falls, 331 NLRB at 1664; Jewish Day School of Greater Washington, 283 NLRB at 760.

¹² Id. at 1664-65. See also Livingstone College, 286 NLRB 1308, 1310 (1987).

Since deciding that Catholic Bishop is to be applied on a case-by-case basis to post-secondary institutions,¹³ the Board has utilized the foregoing factors in three cases to determine if the assertion of jurisdiction would infringe on First Amendment rights. The first case was St. Joseph's College, in which the Board refused to assert jurisdiction over a college founded by the Sisters of Mercy of Maine, a Catholic religious order.¹⁴ The Board relied on the administrative control the Order had over the college given the college's financial dependence on the Order and the requirement that members of the board of trustees could only come from the Order.¹⁵ The Board then emphasized the constraints placed on the faculty, who could not teach ideas contrary to Catholicism and who, at the time of hire, had to agree to promote the objectives of the Order.¹⁶ Finally, the Board noted the role of the Catholic Bishop of Portland, who could, among other things, have faculty members removed if their conduct was not in harmony with Catholic beliefs.¹⁷ In light of these facts, the Board held that asserting jurisdiction would present a significant risk of infringing on First Amendment rights.¹⁸

In another case, Livingstone College, the Board asserted jurisdiction over a college founded by the AME Zion Church.¹⁹ The Board first noted that the college was not financially dependent on the church, that only half the members of the board of trustees had to be church officials, and that the trustees could pass rules promoting academic freedom.²⁰ The Board then noted that the college

¹³ See Livingstone College, 286 NLRB at 1309, fn. 4; St. Joseph's College, 282 NLRB 65, 68 (1986).

¹⁴ 282 NLRB at 68.

¹⁵ Id. at 68.

¹⁶ Ibid.

¹⁷ Ibid.

¹⁸ Ibid.

¹⁹ See 286 NLRB at 1308, 1310.

²⁰ Id. at 1309.

did not have a religious mission and that the faculty did not have to promote the church's teachings, but could teach ideas contrary to those of the church.²¹ In addition, the Board noted that faculty members could not be discharged for advocating ideas contrary to church beliefs.²² Emphasizing the absence of both a religious mission and requirements that faculty conform to certain religious principles, the Board concluded that asserting jurisdiction would not raise First Amendment issues.²³

In a third case, University of Great Falls, the Board asserted jurisdiction over a university founded by the Sisters of Providence, St. Ignatius Province.²⁴ The Board noted that the university was not financially dependent on the Order, that members of the board of trustees did not have to be Catholic, that the trustees were not required to set policies consistent with Catholicism, and that members of the administration did not have to be Catholic.²⁵ Moreover, the faculty was not required to teach or support Catholic doctrine and the curriculum did not emphasize or require an emphasis on Catholicism.²⁶ Based on these facts, the Board concluded that the university did not have a "substantial religious character," and held that asserting jurisdiction would not create the risk of violating First Amendment rights.²⁷

Applying the relevant factors to this case, we conclude that the Board should not assert jurisdiction over the University. Jurisdiction would not be appropriate because a religious order exercises control over the daily operation of the University, the school has a religious

²¹ Ibid.

²² Id. at 1309-10.

²³ Id. at 1310.

²⁴ 331 NLRB at 1666.

²⁵ Id. at 1665-66, fn. 7.

²⁶ Id. at 1665-66.

²⁷ Id. at 1666.

mission, and religious criteria are considered in the appointment and evaluation of faculty.

First, the Order is significantly involved in the University's daily operation through the presence of its members on the board of trustees and administration. The Articles of Incorporation require a minimum of five sisters on the board of trustees, the body responsible for running the affairs and business of the University. The University also asserts that the trustees have never voted contrary to Catholic principles and that such a vote would cause it to lose its sponsorship by the Order and lose its Catholic designation.²⁸ Moreover, the current University president, as was the case with all of her predecessors, is a sister from the Order. Nuns currently occupy many positions in the University's administration. The Order also exerts some degree of control over the University by virtue of its sizeable annual contribution of capital, and the donation of a significant portion of the property and buildings that comprise the main campus.

Second, although the University's primary purpose is to provide a quality education, it consistently represents in its public documents, including the faculty and student handbooks, its commitment to fulfilling a religious mission. Thus, the University states that it seeks to assure a "religious dimension" and "instill in its students St. Dominic's vision of a world that celebrates God's dwelling within us and among us." Moreover, the board of trustees established a Mission Effectiveness Committee to ensure that the University's religious mission is pursued and implemented. The University's Executive Division, which is comprised solely of sisters who serve at the highest level of the University's administration, ensures the presence of "a vital Christian community" at the campus. These factors, in particular, distinguish this case from Livingstone College and University of Great Falls. Unlike those cases, where the Board found "the absence of a religious mission,"²⁹ or the lack of "a

²⁸ Although this assertion has not been substantiated, we would still find that the Order has significant involvement in the daily operation of the University based on the totality of the other factors.

²⁹ Livingstone College, 286 NLRB at 1309.

substantial religious character,"³⁰ the evidence here shows that the University actively seeks to promote and conform to its stated religious mission.

The University has also taken certain steps to ensure that the faculty does not undermine the religious mission. Like St. Joseph's College, where the Board did not assert jurisdiction, potential faculty members are asked during the hiring process if they will support the University's stated mission. While faculty members are permitted considerable academic freedom and are not required to teach or inject religious principles into their courses, they are not free to promote doctrines or views contrary to the purposes or objectives of the University.³¹ These facts contrast with Livingstone College, where the Board, in asserting jurisdiction, noted that the faculty was permitted to teach ideas contrary to those of the affiliated religious institution and could not be discharged for such conduct.

In sum, the Order's significant involvement in the University's operations and the University's efforts to adhere to its stated religious mission and ensure that the faculty does not undermine it demonstrate that the school has a "substantial religious character." Thus, asserting jurisdiction here would create the risk of violating First Amendment rights.

Finally, this case highlights the pragmatic difficulties raised in Catholic Bishop, and subsequently examined by the Board, that would result from asserting jurisdiction. In St. Joseph's College, the Board stressed that asserting jurisdiction was inappropriate because it would have required engaging in the type of inquiry the Supreme Court disapproved of in Catholic Bishop.³² More

³⁰ University of Great Falls, 331 NLRB at 1666.

³¹ We note that the University also asserts that one consideration for faculty promotion is how a professor contributes to the University's mission, including the University's commitment to assuring a "religious dimension."

³² See 282 NLRB at 68.

specifically, asserting jurisdiction would have required the Board to assess whether an adverse personnel action was genuinely motivated by a faculty member's failure to promote or conform to certain religious principles rather than anti-union sentiment.³³ As the Court stated in Catholic Bishop, the very process of such an inquiry would likely violate the right to the free exercise of religion.³⁴

Asserting jurisdiction in this case would likely lead to the same prohibited inquiry. In assessing the veracity of the University's claim that Maldonado displayed a "lack of collegiality" and created "a divisive environment," the Board may become entangled in precisely the sort of inquiry into religious faith and beliefs that the Supreme Court warned against in Catholic Bishop.³⁵ An inquiry into whether Maldonado lacked collegiality or created a divisive environment may involve the Board in questioning the University's commitment to ensuring a "caring environment" and a "Christian community." Because even conducting such an inquiry is prohibited, jurisdiction is inappropriate in this case.³⁶

In light of our conclusion that the Board should not assert jurisdiction in this case, the Region should dismiss the charge, absent withdrawal.

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³³ Id.

³⁴ See NLRB v. Catholic Bishop of Chicago, 440 U.S. at 502. See also St. Joseph's College, 282 NLRB at 68.

³⁵ 440 U.S. at 502.

³⁶ Because jurisdiction is inappropriate here under current Board law, we do not address the applicability of the three-part test the D.C. Circuit announced in University of Great Falls v. NLRB, 278 F.3d at 1343.